“The Façade that is Social Security and Protection in Malawi: Who is Benefiting?

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OVERVIEW

<u>Social Security and Protection</u>

Social security refers to public and private, or to mixed public and private measures, designed to protect individuals and families against income security caused by contingencies such as unemployment, employment injury, maternity, sickness, invalidity, old age and death (Article 1.5 Code of Social Security in the SADC) (not binding but provides direction and guidance to member States in the development and improvement of social security schemes, in order to enhance the welfare of the people of the SADC region e.t.c. *(Nyenti M and Mpedi LG. 2012)*

OVERVIEW

Social Security and Protection in Malawi

The Constitution

“The State shall actively promote the welfare of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality, nutrition, health, environment, rural life, education, the disabled, children, the family, the elderly…” (section13)

OVERVIEW

Malawi's Commitment

To develop policies and legislation aimed at providing access to basic social rights, services and facilities to the citizens as enunciated in the Constitution.

OVERVIEW

Policies on Social Security and Protection in Malawi

No policy on social security but on social protection, covering basic universal protection in the following areas:

1. Health- Free
2. Education- Free
3. Social Cash transfers- Still rolling out to districts to attain universal coverage (government and donor funded)
4. Public Works – rolling out to more districts (government and donor funded)

(Social protection programmes in areas of social cash transfer, public works programme, most sustainable is social cash transfer, supposed to cover whole country but not yet- has two segments (1) very vulnerable graduating them from ultra-poor and the poor

(Directorate of Poverty Reduction and Social Protection under the Ministry of Finance, Economic Development and Planning)

5. Farm Input Subsidy Programme (FISP)- Food security (subsidized farm input for the poor)

OVERVIEW

<u>Legislation on Social Security and Protection in Malawi</u>

No legal framework

It is a façade because it is mentioned in pieces of legislation giving impression that social security as a legal field exists when it doesn’t.

OVERVIEW

Legal Framework

- Employment Act 2000

1. Insolvency of Employer

- Section 34(3) providing that; “on the insolvency or winding up of an employer’s business, the claim of an employee or those claiming on his behalf to wages and other payments to which he is entitled under this Act or any contract shall have priority over all other creditors, **including the State and the social security system”.**

OVERVIEW

<u>Legal Framework</u>

2. Prohibition relating to Payment of Remuneration

- Section 52(2) provides that; no employer shall deduct from the employee's wages any amount, except (a) **<u>'the employee's contribution to a compulsory social security scheme'.</u>**

OVERVIEW

Legal Framework

3. Setting of Minimum Wages

- Section 54 (3) states that; "in prescribing minimum wages, the Minister shall, as far as possible, consider (a) the needs of workers and their families, the general level of wages, the cost of living, **social security benefits** and the relative living standards of other social groups".

OVERVIEW

- **<u>Legal Framework</u>**

Pension Act 2010

4. Section 7(6) provides that; “ a person shall not be appointed as trustee unless the Minister is satisfied that the person is a fit and proper person to hold the office of a trustee... and qualified for the appointment by virtue of his qualification and experience in the following fields (a) financial markets and financial products (b) pension, insurance and **<u>social security,</u>** (c) law, (d) accounting; or (e) economics and finance…”

Overview

<u>Why a Façade?</u>

- It seems that the legislature in Malawi had social security at the back of its mind but failed to adequately articulate the concept in the law or national policy.
- There is no definition of social security in the Malawi statutes.
- Unlike social protection which has a directorate under the Ministry of Finance, there is no similar government agency on social security

OVERVIEW

<u>Why a Façade?</u>

- The scenario created by the casual/ cosmetic mention of a huge field in the provision and protection of basic human rights seems misleading when considered from the legal point of view.

OVERVIEW

Why a Façade?

- In terms of principles of general interpretation at common law, the Court would find that should the legislature intended to provide for social security, it would have said so in 'clear and unequivocal manner'.
- Broad and purposive interpretation of the Constitution may be stretched to cover social security, but in this day when social security is a basic right, it is expected that, it would be EXPRESSLY covered by legislation.

OVERVIEW

- **<u>Has Government Redeemed itself?</u>**

YES

Introduced legislation with SOME characteristics of social security, covering protection of income security.

BUT

It has limited scope. Does not satisfy minimum standards for social security

OVERVIEW

<u>Employment (Amendment) Act 2010</u>

- Malawi shifted the burden of social security to the employer by compelling every employer to place its employees on a mandatory national pension scheme or gratuity.
- The objective being to cushion the employee and his family against the risks of illness, accidents, old age, unemployment and loss of revenue occasioned by family responsibilities.

OVERVIEW

Employment (Amendment) Act 2010 (Severance Allowance)

Section 2 of the Employment (Amendment) Act 2010, states that section 35 of the Employment Act (hereinafter referred to as the principal Act) is amended- (a) by deleting (1) and substituting therefor the following new subsection as subsection (1)- "On the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstances, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance.

OVERVIEW

<u>**Employment (Amendment) Act, 2010**</u>

Section 35A, Part II Salary Threshold

- Where an employer has been exempted under the Pension Act, that employer shall arrange to pay to the employees, on retirement, termination of employment, or death, a gratuity equal to five percent (5%) of the monthly salary of the employer for each completed month of service.

OVERVIEW

<u>Pension Act 2010</u>

Section 9 (1): Subject to section 10, every employer <u>shall</u> make provision for <u>every person</u> under his employment to be a member of the <u>National Pension Scheme</u>.

This provision answers to the ‘universality’ (labour sector) of a social security scheme. It makes it mandatory by using ‘shall’ for ‘every employed person’ to be placed on a National Pension Scheme. It should be noted that the previous legal framework did not provide for mandatory pension provisions.

OVERVIEW

General Challenges

- Income Security is left to employers to fund (ordinarily social security should be funded by government for universal coverage- a major element of functional and sustainable social security)
- Current economic situation not ideal for the extra burden on most employers. Many people are left out.

OVERVIEW

<u>It is not universal</u> because:

- Unemployment high (21%);
- Informal sector is bigger than formal and not properly regulated or supervised(88.7%);
- Not every employee in formal employment is covered;
- Non remission of contributions for those on pension (**arrears as at December 2017 MK9.8 Billion against remittance of MK5.2 Billion) (Financial Stability Report, 2017, RBM);**
- Non compliance with the Pension Act requirements (not putting employees on pension (only **304 000 people on pension**), not putting employees on life insurance;
- Complaint system too complicated;
- Penalties mostly administrative and mostly finance related against employer (the employee is third party therefore limited in enforcement options)

Table 2: CASE STUDY: Operation of Pension and Gratuity under the Scheme

OVERVIEW

No.	Name	Pension	Gratuity	Paid	Not Paid	Reason for Termination
1	Kimu	✓			✓	Retrenched
2	Jonasi	✓			✓	Retrenched
3	Chimbayo	✓			✓	Retrenched
4	Zalimba	✓			✓	Retrenched
5	Chipwele		✓	✓		Retrenched
6	Whayo	✓			✓	Retrenched
7	Munthali	✓			✓	Retrenched
8	Mvula	✓			✓	Retrenched
9	Mwadala	✓			✓	Retrenched
10	Lemani	✓			✓	Retrenched
11	William		✓	✓		Retrenched
12	Kathebwe		✓	✓		Retrenched
13	Lungu	✓			✓	Retrenched
14	Mabvuto	✓			✓	Retrenched
15	Mphonde		✓	✓		Retrenched
16	Hajimani	✓			✓	Retrenched
17	Billy	✓			✓	Retrenched
18	Mkwezalamba	✓			✓	Retrenched
19	Makalani	✓			✓	Resigned
20	Chiphamba	✓			✓	Resigned
21	Edward	✓			✓	Resigned
22	Milliam	✓			✓	Resigned

OVERVIEW

Retrenchment Versus Resignation

- The case study is aimed at providing a glimpse of the realities of the National Pension Scheme. It is a case involving a company registered under the Companies Act. Its main business is that of printing and paper sales. On 5 June 2017, the company retrenched 18 employees due to reasons connected with restructuring of the company. An additional four (4) members of staff resigned from their employment. The total number of terminations twenty -two.

OVERVIEW

Severance allowance Versus Pension

The employees that were retrenched and were on pension, were entitled to receive severance allowance and pension as part of their terminal benefits under the Employment Act 2010 and the Pension Act. However as at writing this paper, 10 months later, the employees had only received their severance allowance and not pension benefits. The employees that resigned were precluded from receiving severance allowance. They were under the law, only entitled to receive pension benefits.

OVERVIEW

Pension Versus Gratuity

- Of the 22 employees, 18 were on pension under the National Pension Scheme, while four were not eligible, due to the exemption clause under the Pension Act. The termination of the four employees was therefore governed by the Employment Act 2010. In accordance with that Act, the four employees received their gratuity at the time of termination. This discharged the obligation of the employer on payment of terminal benefits.
- The payments to the remaining 18 employees were governed by the Pension Act. Which provides that a member can withdraw his pension benefits if, he can show that he has not secured alternative employment six months after the termination

OVERVIEW

Employer Contribution Versus Employees Contribution

- The payment that can be withdrawn relates to only the contributions made by the employee. The balance of the benefits, which are contributions by the employer remain in the scheme until retirement of the employee.
- While those on gratuity receive the employer's contribution, because in gratuity the employee does not contribute

OVERVIEW

Proof of Contributions

- Pay-slips of the employees showed that they were on contributory pension scheme. The employer was deducting from the employees, a sum of money every month which was meant to be remitted towards the employees' pension scheme. (It was imperative that the employees should receive their own contributions six months after termination).

OVERVIEW

Application for Withdrawal of Contributions

- At the expiry of six months and on advice from their trade union, Commercial Workers Union of Malawi (COWUMA), the employees, applied to withdraw pension benefits. The employer advised them that the pension funds were managed by two insurance companies, AON and Old Mutual and referred the employees to these insurance companies for payment.

OVERVIEW

Confusion and Mis- Information

- The company did not specify which of the 18 employees, were pension members under AON and which, were members under the Old Mutual policies. As a result the employees would just make enquiries at both insurance companies. The response from both insurance companies, is that the insurance companies do not deal with individual members; they deal with the company (privity of contract). Therefore they cannot divulge any information to the members. The only message that they could give to the employees is that their funds are not ready for payment. The insurance companies are in negotiations with the company to make the funds available so that the employees can be paid. For any further details the employees should inquire from their employer. As at 20 April 2018 when this author met the representatives of the employees the pension benefits had not been paid out to any one of them.

OVERVIEW

<u>Cash flow Challenges</u>

The employees in desperation kept visiting both the insurance companies and the employer. At each visit the employer promised that he was doing everything in its power to remit the pension benefits so that the employees can access it. He assured the employees he was making arrangements with the insurance companies to make payment once the cash flow improved. He begged the employees not to take him to court because he was doing everything in his power to remit the funds.

OVERVIEW

Lockout and Expenses

- The employees were patient but continued to check on the payment until the employer issued a directive to its existing staff not to let any of the pension seekers into the work premises. The employees have not relented, however, they are spending money on transport visiting the employer, the insurance companies and trade union offices for feedback

OVERVIEW

Calculations and Payments Due

None of the employees waiting for pension knows how much is due to them. No one is willing to give them an account. Perhaps this is understandable considering that the obligation of the Trustee under the Pension Act to provide information on demand is based on the employee being a member of a scheme by virtue of remitting contributions. In the absence of contributions, there could be no information relating to the account of the employee.

OVERVIEW

Complaint Mechanism

Unlike the Employment Act the complaint mechanism provided under the Pension Act is not clear according to the case study. The employees are not members of any scheme in as far as the Pension Act is concerned. This is because their employer did not remit any benefits. There are no records of their membership. There seem to be no trustee, as such the employees have nowhere to complain. The Employment Act provides that any complaints in relation to non-payment of severance allowance be lodged with the District Labour Officer. The labour officer can make severance allowance calculations based on pay-slips and advise the employee accordingly. In court, the employee can make a specific (liquidated) claim based on the pay-slip. It is not as easy with pension.

OVERVIEW

Who is benefitting?

Going by the case study, it can be argued that the national pension scheme is not benefitting the majority of citizens. Below are some basic statistics:

No.	Indicator	Description	Value (Million)		
			Total	Male	Female
1	Total Population	Number of persons enumerated (million)	15.4	7.5	7.9
2	Working Population	Number of persons age 15 – 64 years	7.8	3.6	4.2
3	Employed Persons	Number of persons age 15 – 64 years who, during the reference period categories: paid employment or self-employment or were temporarily absent from a job in which they had a formal attachment	5.5	2.8	2.7
4	Unemployed Persons	Number of persons age 15 – 64 years who, during the reference period were "without" work, " and "currently available to work" – relaxed definition used in the report	1.4	0.5	0.9
5	Inactive Persons	Number of persons who, during the reference period, were neither employed or unemployed	0.8	0.3	0.5
6	Labor Force	Number of person age 15 – 65 who are currently employed and unemployed	7.0	3.3	3.7

OVERVIEW

General Recommendation

The Government may wish to redesign the social security system so that it complies with minimum international standards. For instance:

- It must be expressly provided for in the law and policy
- It must be defined/ described
- It must have universal application
- It must be sustainable
- It must be predictable
- It must be enforceable

THANK YOU

MERCI BEAUCOUP